

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



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OPINIONS

ANIMALS -

GUIDE DOGS FOR DISABLED PERSONS

Q1: Must a service animal be specially licensed or identified to accompany its owner in a public place?

Answer: A service animal need not be specially licensed or identified to accompany its owner in a place of public accommodation. The federal Americans with Disabilities Act preempts a State law that requires documentation that the dog is a service animal.

Q2: What is the meaning of the term “professionally trained” as used in a State statute governing the issuance of orange license tags for “dog guides”?

Answer: A dog may qualify as “professionally trained” if it has been trained by: (1) a person engaged in the profession of training guide dogs for a living, or (2) a person with a high degree of proficiency or skill in training dogs, regardless of how that person earns a living. The ultimate criterion for whether the dog has the proper training is whether it has obtained the skills necessary to aid its owner in overcoming the particular obstacles associated with the owner’s disability. In administering the statute, a local licensing agency may rely on representations concerning a dog’s training and applicable skills, if those representations are contained in a license application made under penalties of perjury.

*Opinion No. 01-014
June 13, 2001*

**COUNTIES -
BORROWING TO IMPROVE LANDFILL**

Article 25, §14A authorizes county commissioners to provide for the disposal of solid waste.

Q1: Does this section authorize Somerset County to borrow funds for the construction of improvements to a sanitary landfill, without obtaining express authority from the General Assembly?

Answer: Yes.

Q2: Does the statute also authorize Somerset County to issue a general obligation bond that pledges its full faith and credit and unlimited taxing power?

Answer: Yes.

*Opinion No. 01-017
June 22, 2001*

**CRIMINAL PROCEDURE -
TIME FOR EXECUTING SEARCH WARRANT**

Question: When does the 15-day time period for executing of a search warrant begin?

Answer: The 15-day period begins on the day after the search warrant is issued by a judicial officer.

*Opinion No. 01-016
June 22, 2001*

**ELECTIONS -
NOMINATIONS BY MINOR PARTY**

Question: May a minor political party (one other than the two “principal political parties” defined in the Election Code) nominate its candidates by convention, if at least one percent of the registered voters in the State are affiliated with that party?

Answer: Such a political party may nominate its candidates by convention in accordance with the party’s rules.

*Opinion No. 01-012
April 24, 2001*

**MUNICIPAL CORPORATIONS -
CITIZEN POLICE REVIEW BOARD**

Question: Would a citizen police review and advisory board proposed for the City of Frederick be consistent with the Law Enforcement Officers’ Bill of Rights (“LEOBR”), the Public Information Act, and the Open Meetings Act?

Answer: The proposed ordinance can be construed and administered in harmony with the LEOBR. However, the Open Meetings and Public Information Acts preclude the degree of confidentiality for records and proceedings of the board that the drafter of the proposed ordinance envisioned. The desired degree of confidentiality could be accomplished if the General Assembly were to enact legislation authorizing municipalities to establish police review boards and prescribing that records and proceedings of those boards remain confidential.

*Opinion No. 01-013
April 30, 2001*

**RACING -
OFF-TRACK BETTING BY COMPUTER**

Youbet.com, Inc. operates an on-line subscription service that enables a subscriber to place off-track bets through the Internet on horse races around the country through the subscriber's personal computer.

Question: What is the legality of the on-line wagering services offered by Youbet.com, Inc.?

Answer: Federal law would not bar the operation of the Youbet Network, so long as the network is operated in compliance with all applicable state laws. A Maryland criminal statute bars the placement of wagers from Maryland through the Youbet Network, as the network is currently designed. However, if that network were to employ telephone betting accounts in accordance with a regulation of the Maryland Racing Commission, it would comply with Maryland law.

*Opinion No. 01-015
June 18, 2001*

ADVICE LETTERS

**ADMINISTRATIVE LAW -
REPUBLISHING PROPOSED REGULATION**

Question: Must the Maryland Health Care Commission republish a proposed regulation amending the State Health Plan, if the Commission decides to delete a certain policy from the proposed regulation?

Answer: The Commission need not republish the proposed regulation, since the deletion of the policy in question would not substantially affect the rights of any regulated entity or the public.

*Letter to
Senator Arthur Dorman
April 18, 2001*

**CIVIL RIGHTS -
ANTIDISCRIMINATION ACT OF 2001***

The Antidiscrimination Act of 2001 (Chapter 340, Laws of Maryland 2001) amends various sections of Article 49B (Human Relations Commission) to add sexual orientation to the list of prohibited bases of discrimination. Article 49B prohibits discrimination by owners or operators of places of public accommodation and by persons licensed or regulated by the Department of Labor, Licensing and Regulation; it also prohibits discriminatory practices in the areas of housing, real estate transactions, and employment. Further, Article 49B, §37 prohibits certain acts of intimidation.

Q1: How will the Act affect the operations of State government?

Answer: The prohibitions of Article 49B apply to the State by virtue of §7, which provides that the State, and its agencies, officers, and employees, may not engage in the types of discrimination barred by the article.

In addition, §25 of Article 49B provides a basis for prohibitions against discrimination going beyond those in Article 49B itself, by directing that executive departments and agencies “[a]dminister their programs and activities in a manner that furthers the purposes of this subtitle.” Also, the Governor’s Code of Fair Employment Practices, Executive Order 01.01.1995.19, prohibits State employees from discriminating “against the public or individuals for any reason prohibited by law” and from authorizing the use of State facilities to further unlawful discrimination or by any organization that unlawfully discriminates.

Because discrimination on the basis of sexual orientation is currently contrary to the policies and practices of many State agencies and programs, Chapter 340 seems likely to require few changes. However, it will require that the Human Relations Commission entertain new types of complaints and

*The Antidiscrimination Act of 2001 has been petitioned to referendum, and a suit has been filed challenging the certification of the petition.

that law enforcement agencies expand their enforcement of antidiscrimination laws. It may also require that agencies amend their regulations barring discrimination in State programs.

*Letter to
Delegate Samuel I. Rosenberg
June 14, 2001*

Q2: Is the Act unconstitutional under the Free Exercise Clauses of the federal and State Constitutions? What constitutional test would a court likely apply in deciding this question?

Answer: The courts would likely apply a rational basis test and uphold the Act against challenge under the Free Exercise Clauses.

*Letter to
Delegate Samuel I. Rosenberg
May 7, 2001*

**COUNTIES -
CREATION OF COUNTY POLICE DEPARTMENT
TO TAKE OVER FUNCTIONS OF SHERIFF**

Referral of Ordinance Creating Department

Question: Could a Calvert County ordinance creating a police department be mandated by the County Commissioners or petitioned by County voters to referendum?

Answer: No. There is no provision in the Maryland Constitution or in State or local law that would allow the voters of Calvert County, neither a charter nor a code home rule county, to petition to referendum an ordinance creating a county police department. Nor does Calvert County have the authority to mandate an ordinance to referendum. In this case, only the General Assembly may place before the voters the question of whether to establish a county police department.

*Letter to
John Douglas Parran,*

*Calvert County Commissioner
June 13, 2001*

Liability of Officer to Suit on Tort Claims

Question: In light of a proposed ordinance to create a Calvert County Police Department, what is the liability of a county government for tort claims made against sheriffs and their deputies, and what would be the liability of individual deputy sheriffs who might transfer their employment to a county police department?

Answer: Chapter 735, Laws of Maryland 2001 expanded the coverage of the Maryland Tort Claims Act ("MTCA") with respect to activities performed by a sheriff or deputy sheriff to include, among others, "personnel and other administrative activities," "activities ... arising under a [Maryland State Police or other State agency] multi-jurisdictional agreement," and "any other activities, except for [those] relating to performing law enforcement functions or detention center functions." If a county police department were established, deputy sheriffs who transferred into the department would become county officers or employees subject to the Local Government Tort Claims Act ("LGTC"); as to them, Calvert County would derive no fiscal benefit from Chapter 735. Under the LGTC, a county police officer would not be statutorily immune from suit, although the officer might assert other, more limited immunities. By way of contrast, under the MTCA the deputy sheriff would be statutorily immune from suit as long as the officer acted within the scope of his or her public duties and without malice or gross negligence. Thus, a deputy sheriff who transferred to the new county police department would give up a broad immunity from tort claims for a more limited one.

*Letter to
Delegate George W. Owings, III
June 1, 2001*

**COUNTIES -
REGULATION OF CAR PHONES
BY CHARTER COUNTIES**

Question: Would State law preempt a proposed Prince George's County ordinance prohibiting the use of certain wireless phones while driving in the County?

Answer: Yes. The proposal in question provides that a person operating a motor vehicle within the County "may not use a wireless telecommunication device to dial, talk, or listen unless the wireless communication device is equipped with a device that allows the operator to maintain both hands on the motor vehicle's steering device." The General Assembly has made it clear in the Transportation Article that the Maryland Vehicle Law is to prevail over all local legislation and regulations on any subject with which the Vehicle Law deals. Although the Vehicle Law does not specifically deal with the use of wireless phones while driving, it does prohibit the use of earplugs, headsets, and earphones (TR §21-1120) and the installation of television-type receiving equipment (TR §224-14), thus covering the subject of equipment that may be used while driving. The counties may not regulate in this area.

*Letter to
Speaker Casper R. Taylor, Jr.
June 19, 2001*

**LEGISLATIVE AUDITOR -
RETENTION OF STATE AGENCY RECORDS**

Question: Is the Office of Legislative Audits authorized to gain access to, and to retain, records of a State agency that refer to internal IP addresses within the agency computer network?

Answer: Yes. However, the Auditor is responsible for treating the information as confidential and handling the records with appropriate security measures.

*Letter to
Mr. Bruce A. Myers
May 25, 2001*

**MUNICIPAL CORPORATIONS -
ANNEXATION AND REZONING OF
AGRICULTURAL LAND**

House Bill 1439 (2001) would have added a new title, "Annexed Agricultural Land," to Article 24 (Political Subdivisions) Miscellaneous Provisions), allowing Harford County or Howard County to enact an ordinance requiring payment into the county agricultural land preservation program by any municipal corporation that might annex and rezone agricultural lands. (The bill passed the House, but received an unfavorable report in the Senate Economic and Environmental Affairs Committee.)

Question: Is there any constitutional objection to the bill?

Answer: Since the bill would apply to more than one county, even if it related to a subject covered by the Express Powers Act, there would be no violation of the Charter County Home Rule Article (Article XI-A) of the State Constitution. However, there is case law going both ways on whether the bill would violate the Municipal Home Rule Article (Article XI-E) of the Constitution, which prohibits the General Assembly from enacting local laws relating to the incorporation, organization, government, or affairs of municipal corporations and requires the Legislature to act in these matters by general laws applicable alike to all municipal corporations. Even if the bill were deemed a general rather than a local law, since it would not apply alike to all municipal corporations

it might be held to violate Article XI-E. On the other hand, since the bill is concerned with agricultural land preservation and would affect persons beyond the boundaries of any municipal corporation, it might be regarded as a valid general law outside the scope of Article XI-E.

*Letter to
Senator Nancy C. Jacobs
April 4, 2001*

**MUNICIPAL CORPORATIONS -
DISPOSAL OF PUBLIC RECORDS**

Question: Does State law require local governments to obtain approval of the State Archives before disposing of public records? If so, has the City of Frederick complied with this requirement?

Answer: Under §10-639 of the State Government Article, public officials, "[i]n accordance with ... record retention and disposal schedules," are to "offer to the [State] Archives any public record that ... no longer is needed." If the Archives declines to accept a public record, the record may, with the written approval of the State Archivist, be destroyed. The term "public official" is defined in §10-637 to include "an official of the State or of a county, city, or town in the State." Thus, a local government may not dispose of public records without the approval of the State Archives. Although the City of Frederick is among several local governments that have no record retention and disposal schedules, it has retained a consultant and is developing a plan to bring itself into compliance with the law.

*Letter to
Mr. Claggett A. Jones
May 29, 2001*

PLANNING -

PLANNING COMMISSION APPROVAL OF PUBLIC PROJECTS

Question: Is construction of a proposed District Court building in Rockville, and of a related parking garage, subject to local planning commission approval under §3.08 of Article 66B?

Answer: The District Court building would be a “public building” subject to local planning commission approval, and the related parking garage would be a “public structure” similarly subject to planning commission approval if the garage were owned by a governmental entity. However, separation of powers limitations would prevent the planning commission from arbitrarily denying approval. Moreover, under §3.08 an adverse planning commission decision on these projects could be overridden by the Rockville City Council or by the State Board of Public Works, the body with jurisdiction over financing. Authorization in a subsequent capital budget might be sufficient to constitute an override. If the garage were privately owned and operated, it would fall outside the purview of §3.08, but would be subject to Rockville’s ordinary planning and zoning authority.

*Letter to
Senator Jennie Forehand
Delegate Kumar Barve
Delegate Michael Gordon
Delegate Cheryl Kagan
June 25, 2001*

TAX CREDITS - REHABILITATION OF CITY-OWNED STRUCTURE

Question: Would the American Visionary Art Museum, a non-profit museum, be eligible for a refunded heritage tax credit under Chapters 160 and 161, Laws of Maryland 2001, if it were to rehabilitate a warehouse it leases from the City of Baltimore?

Answer: Although qualifying non-profit organizations are eligible for such credits, there is a general exclusion for structures owned by the State, a political subdivision, or the federal government. If the City continued to be the legal owner of the warehouse, the museum would not be eligible for a credit. However, the museum might qualify if legal title to the warehouse were conveyed to the museum. Moreover, under some circumstances, the museum might qualify for a tax credit as a transferee, under grandfathering provisions of the new law.

*Letter to
Senator Barbara A. Hoffman
June 12, 2001*

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